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No. 90-1338

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

GULF STATES UTILITIES COMPANY,
Petitioner,

v.

COALITION OF CITIES FOR AFFORDABLE UTILITY RATES,
OFFICE OF PUBLIC UTILITY COUNSEL,
CITY OF BRIDGE CITY, *et al.*, and
PUBLIC UTILITY COMMISSION OF TEXAS,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Texas

EDISON ELECTRIC INSTITUTE MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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March 28, 1991

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Pursuant to Rules 21 and 37 of the Rules of the United States Supreme Court (the Court), the Edison Electric Institute (EEI) respectfully moves this Court for leave to file the brief *amicus curiae* annexed hereto. While the petitioner Gulf States Utilities Company (Gulf States) and the Public Utility Commission of the State of Texas (P.U.C.) have consented to the filing of the attached brief *amicus curiae*, the Coalition of Cities for Affordable Utility Rates, the Office of Public Utility Counsel of the

State of Texas, and the City of Bridge City, *et al.*, have not consented to EEI's participation. The letters providing consent are being filed with the Clerk of the Court concurrently with this motion and the annexed brief.

INTEREST OF EDISON ELECTRIC INSTITUTE

EEI is the national association of investor-owned electric utility companies in the United States. Its members serve 96 percent of all customers served by the investor-owned segment of the industry. They generate approximately 78 percent of all the electricity in the country and serve 74 percent of all ultimate customers in the nation. Gulf States is a member of EEI.

All of EEI's members sell electricity at rates subject to approval by state and federal utility commissions. Therefore, EEI and its members have a substantial interest in assuring that utility rate proceedings are conducted consistent with due process and fundamental fairness so that parties to such proceedings have a meaningful opportunity to present evidence which those commissions require in order to fulfill their statutory duties. EEI appears in this case to support the position of Gulf States that Gulf States must be provided a full and fair opportunity to meet the P.U.C.'s proof requirements.

As the national association of investor-owned electric utilities, EEI is in a position to reflect the impact of the issues raised in this proceeding from a broad perspective. The attached brief *amicus curiae* demonstrates that the questions arising in the instant case are substantial and have broad implications for the nation's electric utilities, their ratepayers and the investors who provide the capital necessary to maintain the reliability and effectiveness of the nation's electric utility systems.

CONCLUSION

For the reasons set forth above and in the attached brief, EEI urges this Court to grant its motion for leave to file the attached brief as *amicus curiae*.

Respectfully submitted,

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QUESTIONS PRESENTED

Edison Electric Institute adopts the questions presented in the Petition for Writ of Certiorari of petitioner Gulf States Utilities Company.

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BRIEF *AMICUS CURIAE* OF EDISON ELECTRIC INSTITUTE IN SUPPORT OF PETITIONER

Amicus curiae, Edison Electric Institute (EEI), respectfully prays that the Court grant the petition of Gulf States Utilities Company (Gulf States) for a writ of certiorari to the Supreme Court of Texas in this matter.

Two parties to this case, Gulf States and the Public Utility Commission of the State of Texas (P.U.C.), have consented to the filing of this brief and copies of those consents are being filed with the Clerk of the Court concurrently with this brief.

INTEREST OF *AMICUS CURIAE*

EEI is the national association of investor-owned electric utility companies in the United States. Its members serve 96 percent of all customers served by the investor-owned segment of the industry. They generate approximately 78 percent of all the electricity in the country and serve 74 percent of all ultimate customers in the nation. Gulf States is a member of EEI.

All of EEI's members sell electricity at rates subject to approval by state and federal utility commissions. Therefore, EEI and its members have a substantial interest in assuring that utility rate proceedings are conducted consistent with due process and fundamental fairness so that parties to such proceedings have a meaningful opportunity to present evidence which those commissions require in order to fulfill their statutory duties. EEI appears in this case to support the position of Gulf States that Gulf States must be provided a full and fair opportunity to meet the P.U.C.'s proof requirements.

SUMMARY OF ARGUMENT

The decision below of the Texas Supreme Court demonstrates the need for this Court to clarify that the Fourteenth Amendment rights of a utility and its investors are violated when a state prevents a major portion of a substantial plant investment from being included in the utility's rate base without giving that utility a full and fair opportunity to meet the regulators' proof requirements.

ARGUMENT

Two terms after this Court's decision in *Duquesne Light Co. v. Barasch*, 488 U.S. 299 (1989), the Texas Supreme Court's decision below demonstrates the need for this Court to provide further guidance to the states with respect to the federal constitutional requirement that they give heed to investors' constitutionally protected rights in setting utility rates. As the national association representing investor-owned utilities, EEI is concerned that the Texas Supreme Court's disregard of investors' rights in this case—if allowed to stand—will create a precedent endangering the ability of utilities in that state and throughout the nation to attract a continued supply of investment capital at reasonable cost.[1] A grant of certiorari in this case will provide the necessary opportunity for this Court to eliminate the uncertainty and debate created by this case concerning the constitutional constraints on state ratemaking.

The *Duquesne* decision reaffirmed long-standing principles regarding the constitutional considerations required in utility ratemaking proceedings set forth in *Federal Power Comm'n v. Hope Natural Gas Co.* (320 U.S. 591 [1944]).[2] In *Duquesne*, this Court specifically

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[1] There is a recognized need for substantial new electric generation capacity in the 1990s. It has been estimated by the North American Electric Reliability Council that 93,700 megawatts (93.7 gigawatts) of additional capacity must be in place by the year 1999. *1990 Reliability Assessment* (NERC, Sep. 1990). The Department of Energy has publicly estimated that there is a need for approximately 100,000 megawatts (100 gigawatts) by the year 2000—approximately the same amount, given the extra year.

[2] In *Hope*, this Court defined the constitutionally protected investor interest in ratemaking as follows:

> From the investor or company point of view it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business. These include service on the debt and dividends on the stock. . . . By that standard the return to the equity owner should be commensurate

recognized that state regulation of utility rates is constrained by the Fifth and Fourteenth Amendments of the United States Constitution. "If the rate does not afford sufficient compensation, the State has taken the use of utility property without paying just compensation and so violated the Fifth and Fourteenth Amendments." 488 U.S. at 308.

The *Duquesne* decision clearly recognized the possibility that a state regulatory process could deal so unfairly with utility interests as to raise serious constitutional questions. Noting that "[o]ne of the elements always relevant to setting the rate under *Hope* is the return investors expect given the risk of the enterprise," this Court in *Duquesne* stated that:

> The risks a utility faces are in large part defined by the rate methodology . . . . Consequently, a State's decision to arbitrarily switch back and forth between methodologies in a way which required investors to bear the risk of bad investments at some times while denying them the benefit of good investments at others would raise serious constitutional questions.

488 U.S. at 314-315 (*see, supra*, Note 2).

Here, the state has effectively denied investors the benefit of a $1.453 billion investment by a means different from, but equally as unacceptable as, that discussed in *Duquesne*. The decision of the Texas Supreme Court effectively has deprived Gulf States of an opportunity to present the evidence sought by the Texas P.U.C. in order to determine whether the utility is to receive a return of, and on, this enormous investment.

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with returns on investments in other enterprises having corresponding risks. That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital.

320 U.S. at 603. This echoed the investor interest required to be protected over two decades earlier in *Bluefield Water Works & Improvement Co. v. West Virginia Pub. Serv. Comm'n*, 262 U.S. 679, 692-93 (1923).

As is more fully explained in Gulf States' Petition, the company did not have any opportunity during the normal course of the rate proceeding to present the evidence required by the P.U.C., because the P.U.C. first imposed those specific new proof requirements after the close of the evidence. *See* Gulf States' Petition at 4-6. Specifically, after the close of the evidence, the P.U.C. adopted an entirely new approach to the case. It allowed recovery only of those costs equivalent to a reasonable 1979 estimate of total costs. However, rather than disallowing the remaining actual costs, the P.U.C. sought further evidence on the $1.453 billion in costs which exceeded that 1979 estimate. *Id.*

Imposition of this new proof requirement was not in and of itself unconstitutional, because the P.U.C. expressly stated that it was making a finding neither of prudence nor of imprudence with respect to that remaining $1.453 billion investment. *See id.* at 6-7. The P.U.C. specifically held the final ratemaking treatment of that huge capital investment in abeyance. However, the Texas Supreme Court effectively closed the door to Gulf States' presentation of the newly required evidence—thus thwarting the P.U.C.'s ability to complete its task—when the court concluded that the P.U.C. lacked the legal authority to defer a decision and barred the P.U.C. from considering the rate treatment of the $1.453 billion investment in any future case. *Coalition of Cities for Affordable Util. Rates v. Public Util. Comm'n*, 798 S.W.2d 560, 564 (Tex. 1990), Pet. App. at 1a, 6a-7a (*Coalition of Cities*).

The Texas Supreme Court ruled that its interpretation of the applicable law meant that the P.U.C.'s failure to address explicitly the rate treatment of the $1.453 billion investment resulted in a complete disallowance of that investment. 798 S.W.2d at 564, Pet. App. at 6a. Nonetheless, the Texas Supreme Court did not provide any mechanism for the P.U.C. to remedy its legal error and reconsider the balance of consumer and investor interests it had attempted to attain in its decision, even

though the dissenters argued that a remand was appropriate. 798 S.W.2d at 568, Pet. App. at 13a. Indeed, by upholding an injunction barring the P.U.C. from reconsidering the prudence of the $1.453 billion investment in any future rate case, the Texas Supreme Court has effectively made it impossible for the P.U.C. or Gulf States to redress the error and remedy the resulting terrible financial harm.

This procedural inadequacy of the opinion of Texas Supreme Court makes a mockery of the constitutional right of Gulf States and its investors to a full and fair opportunity to present evidence to permit the P.U.C. adequately to consider whether to approve rates allowing Gulf States recovery of, or on, its $1.453 billion investment. As a result of the court's violation of its rights, this utility has incurred a degree of fiscal harm which would imperil the financial health of any utility. This is particularly damaging to Gulf States, which has not paid preferred or preference dividends since November of 1986. Studness, *The Travail of River Bend*, Public Utilities Fortnightly, Oct. 11, 1990, 41, 44.[3]

Amicus EEI submits that it is important for this Court to affirm and illuminate its ruling in *Duquesne* by holding in this case that the constitutional requirements of the Fifth and Fourteenth Amendments include fundamental procedural due process and fairness protection so that major investments in utility plant may not be disallowed without giving the utility a full and fair opportunity to meet all of their regulators' proof requirements, most particularly new ones. At the very least, this case provides an opportunity for this Court to declare that a state court cannot disregard the impact upon a utility and its investors of a rate commission's erroneous application of that state's law of utility regulation. When a court finds that a rate commission decision has unwittingly exceeded that commission's

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[3] Holders of these two classes of Gulf States' stock now elect ten of the fifteen members of the company's board. *Id.*

statutory powers in a manner which obviously has a profound impact upon a regulated entity, such as its ability to recover an enormous capital investment, that court must provide some mechanism for the rate commission to reconsider its underlying decision in light of that court's new interpretation of the commission's actual statutory authority.

Further, this Court's precedent outside the context of utility ratemaking supports the view that due process requires an actual opportunity to meet a regulatory agency's proof requirements before a major capital investment can be disallowed. Basically, the "right to present evidence is . . . essential to the fair hearing required by the Due Process Clause." *Jenkins v. McKeithen*, 395 U.S. 411, 429 (1969). (In *Jenkins*, this Court overturned that portion of a state criminal investigatory commission's rules by which an investigatee's right to present oral evidence was conditioned on the sole discretion of the commission.)

The essential right to present evidence must be enforced as much before the highest state courts as before state regulatory bodies. As Justice Holmes stated in *Saunders v. Shaw*, 244 U.S. 317 (1917),

> when the act complained of is the act of the supreme court, done unexpectedly at the end of the proceeding, when the plaintiff in error no longer had any right to add to the record, it would leave a serious gap in the remedy for infraction of constitutional rights if the party aggrieved in such a way could not come here. . . . The denial of rights given by the 14th Amendment need not be by legislation. *Home Teleph. & Teleg. Co. v. Los Angeles*, 227 U. S. 278, 57 L. ed. 510, 33 Sup. Ct. Rep. 312.

244 U.S. at 320. In *Saunders*, this Court held that due process was violated when a state supreme court failed to remand a case to allow a defendant a complete opportunity to counter a plaintiff's evidence. That evidence had been excluded by the trial court as inadmissible, but it was put into the record and relied upon by the state

supreme court to reach judgment against the defendant under a legal standard established after the trial.[4]

As Justice Holmes observed in *Saunders*, one "cannot be sure that the defendant's rights are protected without giving him a chance to put his evidence in." 244 U.S. at 319. Even when a remand would appear to be a mere concession to an empty technicality, the record may not give absolute assurance that the same result would obtain after retrial. *See id.; see also Coalition of Cities*, 798 S.W.2d at 566, n.3, Pet. App. at 13a, n.3. In this light, the Texas Supreme Court's upholding of the injunction in this case and its failure to remand the proceeding to the P.U.C. are violations of due process and fundamental procedural fairness guaranteed under the United States Constitution.

CONCLUSION

WHEREFORE, Edison Electric Institute prays that the Court grant Gulf States Utilities Company's Petition for a Writ of *Certiorari* to the Supreme Court of Texas in this matter.

Respectfully submitted,

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[4] Even more telling in *Saunders* was that the plaintiff's evidence had in fact been answered by the defendant. At the original hearing, the defendant had presented testimony in response to the plaintiff's inadmissible evidence. However, the defendant had prevented the plaintiff from cross-examining that responsive testimony, based on the inadmissability of the plaintiff's evidence. Despite those facts, this Court held that the defendant had not had an adequate opportunity to present his case, and thus that the Louisiana Supreme Court should have remanded the case for presentation of further evidence by the defendant.